No. 74-1561

SUPREME COURT, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

DECOTO AIRCRAFT, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-29) is reported at 512 F.2d 758. The Board's decision and order (Pet. App. 6-20) are reported at 209 NLRB No. 149. The Board's decision in a related representation case (Pet. App. 43-70) is not reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*) was entered on April 7, 1975.[1] The petition for a writ of certiorari was filed on June 12, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The opinion of the court was dated March 6, 1975, but the court did not enter its judgment at that time.

QUESTION PRESENTED

Whether an employer's refusal, during the Regional Director's investigation of union objections to an election, to present evidence on allegations of other employer misconduct disclosed by the investigation, precludes the employer from contesting those allegations in a subsequent unfair labor practice proceeding based on the employer's refusal to bargain with the Board-certified winner of a second election ordered by the Board.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 31-38.

STATEMENT

1. On November 20, 1972, pursuant to a Stipulation for Certification Upon Consent Election (R. 5-6),[2] the Board's Regional Director conducted a secret-ballot election among petitioner Company's employees.[3] The tally showed 45 votes for and 49 votes against the Union, and one challenged ballot which was insufficient to affect the results (Pet. App. 8; R. 8). The Union filed timely objections, asserting, *inter alia*, that the Company had interfered with the election by threatening an employee who supported the Union with a shift change (Pet. App. 44; R. 10).[4] In addition, the Union alleged that the Company had interfered with the election by "other acts and conduct" (*ibid.*).

[2]"R." refers to the bound volume of the original papers comprising the record in the case, which was reproduced for use in the court of appeals. A copy has been lodged with the Clerk.

[3]The unit consisted of all production and maintenance employees at the Company's Yakima, Washington, operations (Pet. App. 13; R. 46, 48).

[4]The Union also raised two additional objections, which the Regional Director overruled (Pet. App. 44-51). The Board adopted his ruling, no exceptions having been taken by the Union (Pet. App. 3, n. 1).

Pursuant to Section 102.69(c) of the Board's Rules and Regulations (29 C.F.R. 102.69(c)), the Regional Director conducted an administrative investigation of the Union's objections, affording the parties a full opportunity to submit pertinent evidence (Pet. App. 44). During the investigation, he uncovered evidence of additional Company misconduct occurring prior to the election, which the Union had not specifically alleged.[5] The Regional Director notified the Company of this additional evidence and requested that the Company respond to it (Pet. App. 55-56). The Company proffered evidence concerning the change of shift, but refused to offer evidence concerning the additional matter which the Union had not specifically alleged (*ibid.*).

The Regional Director found that the uncontroverted additional evidence established that the Company had engaged in five acts that interferred with employee free choice in the election. He found that four of these acts related to and were thus part of the Union's original shift change objection, but that they also could stand independently as conduct that interferred with the election (Pet. App. 69). He further found that, while the shift change objection, standing alone, "does not rise to an act of interference with the election," that conduct, considered in the context of the other Company conduct, constituted undue election interference (Pet. App. 54, 68-69). Accordingly, he recommended that the election be set aside and a second election be held (Pet. App. 69-70).

[5]Employee witnesses had alleged, *inter alia*, that Company representatives had coercively interrogated the employees about protected activities and had promised them benefits if the Union were rejected (Pet. App. 55-56).

The Company filed with the Board exceptions to the Regional Director's finding and recommendation. Finding that the Company had received reasonable notice of the additional acts that were alleged to have interferred with the election, but nevertheless had refused to present any rebutting evidence to the Regional Director (Pet. App. 3, n. 1), the Board adopted the Regional Director's findings and recommendations, and issued an order setting aside the November 20 election and directing a new election (Pet. App. 3-5).

On August 15, 1973, a second election was held, which the Union won by a vote of 54 to 52 (Pet. App. 10, 13; R. 49, 55(b)). Neither party objected to the conduct of the election or challenged any of the ballots (Pet. App. 10-11). Accordingly, the Board certified the Union as the exclusive bargaining representative of the Company's production and maintenance employees (Pet. App. 13; R. 43).

2. The Company refused to recognize and bargain with the Union. The Union filed an unfair labor practice charge with the Board, and a complaint issued alleging that the Company's refusal violated Sections 8(a)(1) and (5) of the Act (Pet. App. 6; R. 44-47). In its answer, the Company admitted its refusal to bargain but challenged the propriety of the Board's action in setting aside the November 20 election and certifying the Union (Pet. App. 7; 48-49).

The General Counsel moved for summary judgment on the ground that all the matters raised by the Company had previously been raised and rejected in the representation proceeding (Pet. App. 7; R. 52-54),[6] and the

[6]The Company had previously requested the Board to permit the Board agent who investigated the Union's objections to testify and produce all employee statements involved in the representation proceeding (R. 50). The Board denied this request on the ground that, under the Board's rules (29 C.F.R. 102.118), statements of employees obtained during an administrative investigation are available for examination by a respondent only after the employee has been called to testify by the General Counsel at a formal hearing (R. 51).

Board issued a notice to show cause why the motion should not be granted (Pet. App. 7-8; R. 56). In its response (Pet. App. 8, 11; R. 67), the Company essentially renewed the contentions previously made, submitting in support of some of its contentions affidavits which were not alleged to reflect newly-discovered evidence (Pet. App. 11; R. 69-79). The Board granted summary judgment and found that the Company's refusal to bargain violated Section 8(a)(1) and (5) of the Act (Pet. App. 11-12, 14).

The Board's order requires the Company to cease and desist from the unfair labor practice found and from interfering with, restraining, or coercing its employees in any like or related manner in the exercise of their statutory rights; to bargain collectively with the Union upon request; and to post appropriate notices (Pet. App. 17-19).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 21-29). The court stated (Pet. App. 26):

> We are satisfied that the cumulative effect of the facts including those uncovered in the Regional Director's investigation warranted setting aside the initial election. These charges remained uncontradicted. Decoto's tactical choice to stand "on the pleadings" left the proceedings in the posture of a default.

ARGUMENT

The decision below, which turns on the facts of this particular case, is correct and does not warrant further review.

1. Although there is no statutory provision for post-election hearings, the Board has, by rule, provided for such a hearing if it appears that there exist "substantial and material factual issues." 29 C.F.R. 102.69(d). This procedure comports with the need that "questions preliminary to the establishment of the bargaining relationship be

expeditiously resolved * * * ." *National Labor Relations Board* v. *O. K. Van Storage, Inc.*, 297 F.2d 74, 76 (C.A. 5). Moreover, the burden of showing that substantial and material factual issues exist is not met by "'nebulous and declamatory assertions, wholly unspecified,'" but requires "'specific evidence of specific events from or about specific people.'" *United States Rubber Co.* v. *National Labor Relations Board*, 373 F.2d 602, 606 (C.A. 5). The Board and the court of appeals properly concluded that the Company failed to meet this burden by electing not to submit evidence to the Regional Director at the investigatory stage, and, instead, waiting to submit such evidence at later stages of the proceedings.

The Board is not limited to the precise allegations made by the parties, but has discretion to resolve objections and challenges on the basis of all of the facts obtained in its post-election investigation. *Independent, Inc.* v. *National Labor Relations Board*, 406 F.2d 203, 206-207 (C.A. 5); *National Labor Relations Board* v. *Tennessee Packers, Inc.*, 379 F.2d 172, 179 (C.A. 6), certiorari denied, 389 U.S. 958. Moreover, in the interest of orderly procedure and the expeditious resolution of representation issues, the Board may properly require that proffers of evidence be timely made. See *National Labor Relations Board* v. *Rex-all Chemical Co.*, 370 F.2d 363, 365-366 (C.A. 1); cf. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37.

2. The evidentiary deficiencies in petitioner's defense would not be cured even if, as petitioner urges (Pet. 11), the exceptions signed by the Company's attorney (Pet. App. 71-81) were regarded as the equivalent of a verified pleading, for petitioner offered no satisfactory explanation for its failure to furnish the evidence to the Regional Director earlier.

Nor was the Regional Director's decision contrary to the Stipulation for Certification Upon Consent Election (Pet. 14-15) signed by the parties and approved by the Regional Director. The Stipulation provides, *inter alia*, that "[a]ll procedure subsequent to the conclusion of counting ballots shall be in conformity with the Board's Rules and Regulations" (R. 5). The procedures followed here did so conform.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

JULIUS ROSENBAUM,
Attorney,
National Labor Relations Board.

JULY 1975.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v. No. 74-2021

DECOTO AIRCRAFT, INC.,
RESPONDENT.

JUDGMENT

Before: Choy and Goodwin, Circuit Judges, and Burns,* District Judge.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board to enforce its order dated April 3, 1974, directed against Respondent, Decoto Aircraft, Inc., its officers, agents, successors and assigns. The Court heard argument of respective counsel on January 10, 1975, and has considered the briefs and transcripts of record filed in this cause. On March 6, 1975, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that:

Respondent, Decoto Aircraft, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

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*The Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

(a) Refusing to provide information necessary and relevant for intelligent collective bargaining and to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local Lodge 1531, International Association of Machinists & Aerospace Workers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees at the Respondent's Yakima, Washington, operations, excluding office clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request, provide information necessary and relevant for intelligent collective bargaining and bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Yakima, Washington, operations copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 19, (Seattle, Washington) National Labor Relations Board shall, after being duly signed by Respondent's representative, shall be posted by Respondent immediately

upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the aforesaid Regional Director in writing, within 20 days from the date of this Judgment, what steps have been taken to comply herewith.

With costs in favor of the
Board and against the respondent:

Cost of printing brief of NLRB	$192.60
Total	$192.60

SO ORDERED:

/s/ Herbert Y. C. Choy

Emil E. Melfi
Clerk

by:

/s/ Alfred T. Goodwin

Susan A. White
Deputy Clerk

U.S. CIRCUIT JUDGES

/s/ James M. Burns

U.S. DISTRICT JUDGE

Filed: April 7, 1975.

APPENDIX

NOTICE TO EMPLOYEES
POSTED PURSUANT TO A JUDGMENT OF THE
UNITED STATES COURT OF APPEALS ENFORCING
AN ORDER OF THE NATIONA LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local Lodge 1531, International Association of Machinists & Aerospace Workers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, provide information necessary and relevant for intelligent collective bargaining and bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees at the Respondent's Yakima, Washington, operations, excluding office clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

DECOTO AIRCRAFT, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 10th Floor Republic Building, 1511 Third Avenue, Seattle, Washington 98101, Telephone 206-442-4532.